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In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Appellants,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

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QUESTIONS PRESENTED

1. Did the three-judge court correctly conclude that preclearance of a specific number of positions in a Louisiana judicial district constitutes preclearance of each such position?

2. Did the three-judge court correctly conclude that certain other Louisiana judgeships have been precleared?

3. Can the Justice Department use Section 5 of the Voting Rights Act to refuse to preclear additional judgeships solely because of opposition to a pre-existing "system" of electing judges?

4. Did the three-judge court err in scheduling elections for certain unprecleared judgeships on November 6, 1990, and December 8, 1990?

5. Should judges elected to certain unprecleared positions be removed from office?

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STATEMENT OF THE CASE

A. The Judicial System in Louisiana

The Louisiana Constitution vests judicial power in the State of Louisiana in a Supreme Court, courts of appeal, district courts, and other courts authorized by the Louisiana Constitution. La. Const. art. 5, § 1. This appeal involves the courts of appeal and the district courts.

There are five circuit courts of appeal in Louisiana, each of which is divided into separate election districts. La. R.S. 13:312. The appellate jurisdiction for these courts extends to all civil matters, all family and juvenile court matters, and substantially all criminal matters, except capital cases. La. Const. art. 5, § 10.

There are forty district courts in the State of Louisiana, together with both a civil and criminal district court in the Parish of Orleans. La. R.S. 13:477, 13:1136, 13:1335. Each judicial district must be composed of at least one parish. La. Const. art. 5, § 14. Where the district contains more than one judge, the judges are elected at-large from the entire district. They are the primary courts of original jurisdiction for both civil and criminal matters, except in Orleans where these functions are separated. La. Const. art. 5, §§ 16(A), 32.

"Both prior to and subsequent to the Voting Rights Act of 1965, the district judges were elected on an at-large basis by district, while the judges on the courts of appeal were elected by circuit, on both a division and an at-large basis."[1] *Clark v. Roemer*, 751 F. Supp. 586, 588; Appendix

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[1] La. Const. art. 5, § 14 (district judges) & § 9 (courts of appeal). *See also* La. Const. of 1921, art. 7, § 31 (district judges); La. Const. of 1921, art. 7, §§ 20, 21; La. Const. of 1913, art. 100; La. Const. of 1898, art. 100; and La. Const. of 1879, art. 97 (courts of appeal). 751 F. Supp. at 588 n.5; J.S. App. 4a n.5.

to Jurisdictional Statement 4a [hereinafter "J.S. App. #"] (M.D.La. 1990) (three-judge court).[2] Many of these judgeships predate the Voting Rights Act of 1965.[3] The delegates to the Louisiana Constitutional Convention of 1973 "overwhelmingly voted to retain the concept of electing district judges on a district-wide, at-large basis and electing court of appeal judges by circuit." 751 F. Supp. at 588; J.S. App. 5a. The 1974 Louisiana Constitution was precleared by the Justice Department. *Chisom v. Edwards*, 690 F. Supp. 1524, 1525 & n.4 (E.D. La. 1988).

Louisiana, like the United States and the other states, has periodically needed additional judges to deal with an ever increasing caseload. *See Clark v. Edwards*, 725 F. Supp. 285, 294 (M.D. La. 1988). As judgeships were added, "the state, on most occasions, would seek preclearance of the newly enacted act from the Attorney General of the United States." 751 F. Supp. at 589, J.S. App. 7a. Preclearance requests for additional judgeships were made 81 times before 1988. 751 F. Supp. at 593 n.41, J.S. App. 29a n.41. *Every* preclearance request made before institution of this lawsuit was granted. *Id.* The

[2] This lengthy opinion of the three-judge court was rendered October 31, 1990, after submission of well over fifty pleadings and copious memoranda and after two hearings. This opinion is hereinafter cited by its page number in the Federal Supplement and in the Appendix to the Jurisdictional Statement.

[3] A list of such judgeships can be found in Appendix B to the three-judge court decision of October 31, 1990. 751 F. Supp. at 601.

State, however, failed to submit certain additional judgeships for preclearance.[4] The three-judge court found:

> Many of the judgeships which the state failed to preclear have been in existence for many years. In many instances the state sought and obtained preclearance of an additional position in a particular district in which preclearance had not been sought for an earlier position.

751 F. Supp. at 589, J.S. App. 7a-8a.

B. Procedural History of this Case

This appeal only involves questions under Section 5 of the Voting Rights Act. Because most of the litigation thus far has involved Section 2(b) of the Voting Rights Act, recapping the procedural history requires an initial discussion of the Section 2(b) claims.

1. The Voting Rights Act Section 2(b) Claims

Appellants brought this lawsuit in 1986 in the United States District Court for the Middle District of Louisiana as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consisted of all black voters in the State of Louisiana. The action challenged the at-large voting system for the election of district, family court and courts of appeal judges as being in violation of the 1965 Voting Rights Act, as amended, because, allegedly, the use of an at-large system results in

[4] Most of the unprecleared judgeships were created during the 1970s or even earlier. A chart showing the stipulated list of precleared and unprecleared judgeships appears in the Joint Appendix [hereinafter "J.A. #"] on pp. 214-21. Louisiana contends that certain other judgeships have been precleared and prepared substitute pages for that chart. *See* J.A. 236-38.

a denial or abridgment of the right to vote of appellants and all those similarly situated on account of race and color.

When this lawsuit was filed there were 48 courts of appeal judges in Louisiana. *Clark v. Edwards*, 725 F. Supp. 285, 288 (M.D. La. 1988). As of the same date, 156 judges were elected to serve in the judicial districts outside of Orleans Parish. *Id.* In Orleans Parish there were 10 criminal district court judges and 12 civil district court judges. *Id.*

On August 15, 1988, the district court held that the Louisiana at-large judicial election system violated Section 2 of the Voting Rights Act. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). The district court enjoined judicial elections which were scheduled for Fall, 1988. This injunction was overturned by the United States Court of Appeals for the Fifth Circuit. *Clark v. Roemer*, 88-3626 (5th Cir. Sept. 7 1988) (*per curiam*) (unreported). An Application for Stay to this Court was denied by Justice White. When the Application was resubmitted to Justice Marshall, he submitted it to the full Court, which once again denied the stay. *Clark v. Roemer*, 487 U.S. 1266 (1988).

In February 1990 the district court held a remedy trial, ultimately ordering sub-districting in nine district courts, the family court in East Baton Rouge Parish, and in a sub-district of one court of appeal. The district court reversed in part its August 1988 decision which had held that violations existed in fourteen additional judicial districts, and in several courts of appeal. *Clark v. Roemer*, Findings of Fact and Conclusions of Law – Remedy Stage (M.D. La. June 12, 1990) (unreported)[hereinafter "Remedy Opinion p. #"].

On September 28, 1990, the Fifth Circuit rendered its *en banc* decision in the case of *League of Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), *cert. granted*, ___ U.S. __, 112 L.Ed.2d 838 (1991)[*"LULAC"*], holding that Section 2(b) of the Voting Rights Act does not apply to the judiciary. The district court in this case then granted a Rule 54(b) motion filed by appellees, dismissing:

> plaintiffs' claim that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973."

Clark v. Roemer, Order (M.D. La. October 19, 1990) (unreported).

This decision was appealed by appellants to the Fifth Circuit and docketed under 90-3785. Appellants then filed a petition for a writ of certiorari, before judgment, to this Court. No. 90-898. The appeal and the petition are still pending.

2. The Voting Rights Act Section 5 Claims

The appellants also asserted in their Complaint and amendments thereto that certain Louisiana statutory provisions creating additional judgeships had not been precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act. Five judgeship elections were enjoined by a three-judge court on September 27, 1988. Thereafter, no action was taken by appellants regarding the Section 5 claims until July, 1990, four years after instituting this lawsuit. At that time they moved to submit the Section 5 claims to a three-judge court, which was

composed of Circuit Judge Davis, Chief Judge Parker[5], and Judge Polozola.

On September 28, 1990, the three-judge court entered an interim order permitting to occur the regularly scheduled primary elections on October 6, 1990, and the runoff on November 6, 1990, but enjoining the winning candidates from unprecleared districts from taking office. J.S. App. 90a. Qualifying for some of those positions had begun before a hearing was requested to enjoin those elections. 751 F. Supp. at 594; J.S. App. 32a. Appellants did not appeal the refusal to enjoin the election.

That same day, September 28, 1990, the Fifth Circuit issued its *en banc* decision in *LULAC*. Based on the *LULAC* decision, on October 2, 1990, Judge Parker ordered that elections which he had earlier enjoined under the Section 2 portion of this lawsuit should go forward. *Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990). The three-judge court in a separate order issued on October 2, 1990, allowed certain other elections to take place on the same schedule as set forth in its September 28, 1990, opinion, again with the winners being forbidden from taking office. J.S. App. 85a. Appellants did not appeal the refusal to enjoin the election.

On October 18, 1990, the three-judge court held another hearing concerning the 1990 judicial elections. On October 22, 1990, the court issued an order allowing the elections to go forward. 751 F. Supp. 586, 598, J.S. App. 68a. By that time well over fifty pleadings and copious memoranda had been submitted to the three-judge court.

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[5] Judge Parker has presided over the district court proceeding during the entire history of this case, including two lengthy trials.

On October 31, 1990, the court issued a lengthy opinion explaining its order. 751 F. Supp. 586; J.S. App. 1a.

The order and opinion addressed elections to be held under four different categories of statutes. First, elections for judgeships previously precleared or which did not require preclearance would take place. 751 F. Supp. at 590, J.S. App. 12a-13a. Second, the three-judge court held that a number of statutes creating judicial positions had been precleared, ruling "that when 'the Attorney General cleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in the district.' " 751 F. Supp. at 590, J.S. App. 13a. Third, elections would proceed for certain other judgeships which had not been precleared but for which the three-judge court had allowed qualifying and campaigning. 751 F. Supp. at 590-91, J.S. App. 14a-15a. Judges elected to these positions would serve provisionally pending further orders of the court. Finally, the three-judge court enjoined certain other elections where the court had not permitted qualifying to reopen since the qualification had originally occurred more than two years before. 751 F. Supp. at 591 n.24, J.S. App. 17a n.24. The three-judge court held that within ninety days the State of Louisiana must either obtain preclearance of the unprecleared judgeships or file a declaratory action with the United States District Court for the District of Columbia under the provisions of 42 U.S.C. § 1973c, failing which the judges provisionally

elected would be automatically removed from office. 751 F. Supp. at 590-91, J.S. App. 16a-17a.[6]

On October 29, 1990, appellants filed an application for injunction pending appeal to this Court. On November 2, 1990, this Court enjoined the elections which the three-judge court held had not been precleared. *Clark v. Roemer*, ___ U.S. ___, 112 L.Ed.2d 390 (1990), *modified*, ___ U.S. ___, 112 L.Ed.2d 391 (1990). The injunction was conditioned upon the timely filing of a jurisdictional statement in this Court. This Court refused to overturn the three-judge court's order holding that certain additional judgeships had been precleared because of the preclearance of subsequent statutes which once again increased the number of judges in the applicable judicial districts. This Court also refused to remove the judges who were either elected on October 6, 1990, or who had not drawn opposition for the October 6, 1990 election. This appeal followed, and probable jurisdiction was noted by this Court on January 18, 1991. ___ U.S. ___, 112 L.Ed.2d 838 (1991).

SUMMARY OF ARGUMENT

1. The three-judge court correctly concluded that preclearance of a specific number of positions in a Louisiana judicial district constitutes preclearance of each of those judicial positions. The three-judge court correctly

[6] Louisiana has filed such a declaratory action. The appellants commented in their brief that this action was filed on the next to last day of the applicable period. The United States did not file an answer until the very last day of the sixty day period allowed for such an answer.

analyzed Louisiana's preclearance submissions and the Justice Department's responses. This case is distinguishable from *McCain v. Lybrand*, 465 U.S. 236 (1984), in which this Court held that preclearance of additional council members and of redrawn residency districts for Edgefield County did not constitute preclearance of earlier, dramatic changes in the form of government for the County, including a change to an at-large system of government. The three-judge court also correctly concluded that certain other acts affecting Louisiana courts of appeal districts and judicial districts have been precleared.

2. The Justice Department cannot refuse to preclear additional judgeships in Louisiana because it dislikes Louisiana's "system" of electing judges, a "system" which predates the Voting Rights Act of 1965. The record is devoid of any evidence that Louisiana adopted this election "system" for discriminatory purposes. The Justice Department takes the radical position that Louisiana must change its system of electing judges to a system composed of "neighborhood judges" or a system in which voters do not have the right to vote for each judgeship to be elected in the judicial district. Either such system is highly undesirable and repugnant. Moreover, changing the method of electing the unprecleared judicial positions will not alter the existing Louisiana judicial election "system"; instead, some judges would be elected under the existing system and some under the new system, thereby thoroughly confusing the electorate. The Department's refusal to preclear these additional judgeships ignores decisions by this Court, by the Fifth Circuit, and by the district court in this case. The Department is also violating its regulations by failing to approve these additional judgeships.

3. The three-judge court's decision that elections for certain unprecleared judgeships should take place on November 6, 1990, and December 8, 1990, is now moot. Nevertheless, the three-judge court correctly weighed the interests of all involved and reached an appropriate remedy in allowing the elections to take place and the winners to serve provisionally.

4. Judges elected during 1990 to unprecleared judicial positions should not be removed from office. These elected judges should continue to serve provisionally until a decision is reached in Louisiana's preclearance action in the district court in the District of Columbia.

ARGUMENT

I. THE THREE-JUDGE COURT CORRECTLY CONCLUDED THAT CERTAIN JUDGESHIPS HAVE BEEN PRECLEARED.

A. Preclearance of a Specific Number of Positions in a Louisiana Judicial District Constitutes Preclearance of Each of Those Positions.

As Louisiana has needed additional judgeships since 1965, in most instances the State sought preclearance of such judgeships. 751 F. Supp. at 589, J.S. App. 7a. The Justice Department routinely precleared such additional judgeships every time a request was made, totalling 81 times prior to this lawsuit. 751 F. Supp. at 593 n.41; J.S. App. 29a n.41. Louisiana, however, failed to submit some additional judgeships for preclearance, most of which judgeships were created during the 1970s or even earlier. 751 F. Supp. at 589, J.S. App. 7a-8a, J.A. 214-21.

In 1988 the Justice Department suddenly did an "about-face" and refused to preclear additional judgeships. The Justice Department stated that it was not opposed to adding judgeships but that it was opposed to the pre-existing Louisiana "system" of electing judges.[7] The Justice Department wants to replace this "system" with a system of neighborhood judges or a system in which voters can vote for only a limited number of the judicial positions on a ballot.[8]

In most of the judicial districts where the Justice Department refused to preclear a judgeship, the Justice Department had precleared one or more of the judgeships created after creation of the unprecleared judgeship. After reviewing the evidence adduced by the parties, the three-judge court concluded:

> [W]hen the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district.

751 F. Supp. at 592, J.S. App. 23a-24a. The appellants contend that this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984), mandates reversal of this holding.

McCain is easily distinguishable from this case. *McCain* involved changes in the form of government in Edgefield County, South Carolina. Until 1966, Edgefield County was governed by a three member Board of County Commissioners. The chairman, known as the County Supervisor, was elected at large. The other two

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[7] *See* pages 28-30 *infra*.

[8] Problems with such systems are discussed on pages 37-41 *infra*.

members were appointed by the Governor of South Carolina, upon recommendation of a majority of the county's legislative delegation after a county-wide straw vote on prospective appointees. There were no residency requirements for the Commissioners. All three Commissioners served four year terms.

In 1966 South Carolina "created a new form of government for Edgefield County," *id.* at 239, abolishing the County Supervisor and the Board of County Commissioners. Members of the new three member County Council were to be elected at large throughout the county, although each had to reside in a separate residency district. Members served for two year terms, and the three members annually elected a chairman. This act was not precleared. *Id.* at 238.

In 1971 South Carolina made further changes in the Edgefield County government, increasing the number of residency districts and thus the number of council members from three to five. As this Court noted, "[n]ecessarily the change in the number of districts resulted in new district boundaries." *Id.* at 240. Preclearance of this 1971 act was sought and received. *Id.* at 241.

Thereafter, minority voters in Edgefield County filed a class action suit alleging constitutional violations, later amending the action to contend that the 1966 act was never precleared. Ultimately, this Court held that preclearance of the 1971 act did not constitute preclearance of the 1966 act. The 1971 act involved "an increase in the number of Council members and residency districts." *Id.* at 251. The unprecleared 1966 act, however, totally rewrote the form of government for Edgefield County, providing for at-large election of all members of the

governing body, devising residency districts, and shortening the term of office. In approving the 1971 change, the Attorney General was focusing on the change in boundaries and number of seats, not on the dramatic change to an at-large system made by the 1966 act. *Id.* at 252.

Analysis of the briefs in *McCain* shows that the issue before the Court was whether approval of the increased number of districts in 1971 constituted preclearance of the change to an at-large system in 1966. The Questions Presented section of the Jurisdictional Statement in *McCain* included:

> 2. Whether pre-clearance under § 5 of a 1971 submission expressly limited to an increase in size of the Council from three to five members, resulted in preclearance *sub silentio* of at-large elections adopted in 1966, where the submission contained no information to enable the Attorney General to determine whether the 1966 use of at-large voting was a change from any prior practice . . .

p. i. A similar question was stated in the *McCain* Appellants' Brief on the Merits. *See* pp. i-ii. Moreover, the United States in *McCain* included as a question:

> 1. Whether the Attorney General can be deemed to have granted preclearance pursuant to Section 5 of the Voting Rights Act to the use of at-large elections for selecting Edgefield County Council members by his failure to object to a 1971 Act that purported only to increase the size of the county council and that was submitted for review without any indication that the county wished preclearance for the use of at-large elections or that at-large elections were a change in voting practices that had never received preclearance.

p. i.

While in *McCain* the unprecleared act created a completely new method of electing the county government, here almost all of the unprecleared acts merely provided for an additional judgeship in various districts[9] and stated that the total number of judgeships would be the increased number.[10] A subsequent statute (which was precleared) once again added a judgeship and stated that the total number would be the new increased number. An example of this situation is Caddo Parish, the First Judicial District:

Division	Added	Preclearance Requested[11]	Granted[12]	Denied[13]
A		N/A		
B		N/A		
C		N/A		
D		N/A		
E	Acts 1966, No. 2	YES	8/18/86	
F	Acts 1973, No. 117	YES		9/23/88
G	Acts 1976, No. 46	YES	8/11/76	
H	Acts 1978, No. 39	YES	9/20/78	
I	Acts 1982, No. 21	YES	12/2/82	

[9] The appellants concede in their brief that "[m]ost" of the judgeships which the three-judge court held to be precleared fit in this category. p. 7.

[10] The history of Louisiana's "method" of electing judges is described in footnote 25 on page 27 *infra*.

[11] Acts 1956, Ex. Sess. No. 7, § 1, amended former R.S. 13:621 to provide that the First Judicial District should have four judges. This Act predated the 1965 Voting Rights Act.

The three-judge court deemed it nonsensical that adding Judge No. 5 (Division "E") to the first four judges was permissible, and that adding Judges No. 7, No. 8, and No. 9 (Divisions "G, H, and I", respectively) to the existing judgeships were each permissible, but that somehow adding Judge 6 (Division "F") to Judges 1, 2, 3, 4 and 5 was objectionable. The three-judge court held as follows concerning the submissions for the First Judicial District:

> We find that when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district. . . . We reach this conclusion because each of the Acts of the legislature which added a new division in Caddo Parish provided that the Act increased the number of judges in the district from an existing number to a new number. When the Attorney General precleared seven judicial positions in Caddo Parish at the time Division G was added, he thereby expressly approved the first six positions, which included Division F. Contrary to plaintiffs' argument, we find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990, order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance,

[12] All but one of the applicable preclearance letters by the U.S. Department of Justice are reproduced in the Joint Appendix. *See* J.A. 210, 208, 200. The preclearance letter for Acts 1976, No. 46, is reproduced beginning on App. 3 of the Motion to Dismiss or Affirm filed by the State of Louisiana in this Court on January 14, 1991.

[13] This letter is reproduced beginning at J.S. App. 108a.

support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

In determining whether the preclearance sought by the State of Louisiana was proper within the meaning of Section 5 of the Voting Rights Act of 1965, the Court must determine whether the submission was in an "unambiguous and recordable manner" and whether the submission was "in fact evaluated" by the Attorney General. The Court finds that the evidence presented in this case does show that the submissions were made to the Attorney General in an unambiguous manner, and he approved the various increases in the number of judges to be added to each of the districts set forth in Part I of our October 22 order.

751 F. Supp. at 592, J.S. App. 23a-29a.[14]

The inconsistencies in the approach by the Justice Department were not limited to the First Judicial District. Other examples drawn from the chart on J.A. 214-21 include:

> Sixteenth Judicial District – After approving and preclearing judgeships for Divisions "E" and "F", created in 1977 and 1981, the Justice Department objected in 1988 to a judgeship created for Division "D" 20 years earlier.
>
> Twenty-First Judicial District – After approving and preclearing a judgeship for Division "E" created in 1977, the Justice Department objected in 1988 to a judgeship created for Division "D" 14 years earlier.
>
> Twenty-Third Judicial District – After approving and preclearing a judgeship for Division "D" created in 1982, the Justice Department objected in 1988 to a judgeship created for Division "C" 20 years earlier.
>
> Twenty-Seventh Judicial District – After approving and preclearing a judgeship for Division "D" created in 1982, the Justice Department objected in 1988 to a judgeship created for Division "C" 17 years earlier.
>
> Twenty-Ninth Judicial District – After approving and preclearing judgeships for Divisions "D" and "E" created in 1978 and 1981, the Justice Department objected in 1988 to a judgeship created for Division "C" 18 years earlier.

After considering these and many other anomalies, and after reviewing the Louisiana statutes and the submission letters, the three-judge court concluded that all of these seats had been precleared, stating:

> The example which the Court used in our opinion involved Caddo Parish. The same reasoning was used for each of the parishes in which the Court found preclearance by the Attorney General when he approved a subsequent act in a particular district.

751 F. Supp. at 593 n.39, J.S. App. 27a n.39.[15] Such a conclusion is logical and in keeping with the purpose of

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[14] The three-judge court called Louisiana's submissions:

> clearly distinct and different from the facts set forth in *McCain v. Lybrand*, which is relied on by the plaintiff. It cannot be said that the submission by the State of Louisiana was ambiguous concerning the scope of the request.

751 F. Supp. at 592 n.38, J.S. App. 26a n.38 (citations omitted).

[15] To enact a new statute in Louisiana, the legislature must repeal the old statute and then amend and reenact it. "A bill

(Continued on following page)

Section 5, which is to prevent discriminatory changes and allow nondiscriminatory changes.[16]

Significantly, the Justice Department approved *every* additional judgeship sought on the 81 occasions that Louisiana made preclearance requests concerning additional judgeships. 751 F. Supp. at 593, n.41, J.S. App. 29a n.41. Approval of such acts continued during the pendency of

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enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of law shall be adopted by general reference to it." La. Const. art. 3, § 15(b). Louisiana courts have held that when the legislature amends a law it cannot simply amend the existing statute; instead, the legislature must amend it and reenact the law *in toto*. *See, e.g., State v. Boylston*, 69 So. 860 (1915).

[16] The logic of the three-judge court's approach is demonstrated by the absurdity of the alternative. Two judgeships in the Twenty-Third Judicial District predated the Voting Rights Act of 1965. Preclearance of Judgeship "C", added by Acts 1968, No. 464, was rejected in 1988. J.S. App. 108a. Judgeship "D" was added by Acts 1982, No. 21, and was promptly precleared. *See* J.A. 218. Under the Justice Department's theory, there could not be four judges in that judicial district because the third judge was not precleared. Additionally, arguably there could not be three judges because the Justice Department refused to preclear having three judges. Thus, there could only be two judges, one-half the number the Twenty-Third Judicial District needs. Indeed, arguably there cannot be *any* judges in the Twenty-Third Judicial District. Having only two judges would be a change from what was precleared in 1982, which change would itself require preclearance. Given that the Justice Department has refused for the past two years to preclear almost every additional judgeship in Louisiana, presumably the Justice Department would not preclear having one or two judges in that district.

this litigation until Judge Parker rendered his initial decision that Louisiana's method of electing judges violated Section 2 of the Voting Rights Act.[17] *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). Thereafter, the Justice Department suddenly reversed its attitude and policies, and, in doing so, refused to preclear new acts creating additional judgeships and refused to preclear acts passed as long as twenty years ago creating additional judgeships. In its October 31, 1990 Opinion, the three-judge court stated:

> The evidence submitted by the parties indicates that the Attorney General approved the method Louisiana used for adding judges approximately 81 times. Preclearance was denied on only three dates: September 23, 1988; May 12, 1989; and September 17, 1990. These denials came after Judge Parker had rendered his decision in the Section 2 case on August 15, 1988.

751 F. Supp. at 593 n.41, J.S. App. 29a n.41.

The appellants also contend that the three-judge court's action is contrary to the decision of the three-judge court in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem. Martin v. Haith*, 477 U.S. 901 (1986). In *Haith*, however, the unprecleared acts involved substantive changes in the method of electing judges, not simply an addition to the number of judges. The first unprecleared statute, Session Law Chapter 262 of 1965, established a system of numbered posts for superior court judges. 618 F. Supp. at 411-12. The second unprecleared statute, Session Law Chapter 997 of 1967, provided for additional judges who would serve terms

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[17] *See, e.g.*, Justice Department Letter, August 18, 1986, J.A. 210.

staggered from the positions already in existence in those districts. *Id.* at 412.[18]

Once again, the Louisiana acts that were not precleared did not change the majority vote, designated post, at-large system of electing judges in Louisiana. These acts merely increased the number of judges to be elected in a judicial district. Surely if having seven judges does not violate Section 5 of the Voting Rights Act, having six judges does not do so either.[19]

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[18] Further, a summary affirmance such as occurred in *Haith* is "not of the same precedential value as would be an opinion of the Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *accord*, *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

[19] The appellants make the following specious argument: Allowing preclearance of the total number of judgeships to constitute preclearance of each of those judgeships will encourage jurisdictions to add judgeships for discriminatory reasons and fail to preclear them in the hope that "someday in the future" the jurisdiction will add another judgeship for non-discriminatory reasons, which will be precleared and will thus cure the previous, unprecleared judgeship. There is absolutely no evidence in the record that Louisiana added any judgeship for any discriminatory reason. Instead, Louisiana added a judgeship because Louisiana needed another judge. The three-judge court found that all parties conceded these facts. 751 F. Supp. at 595 n.50, J.S. App. 37a n.50. If a jurisdiction does add a judgeship for a discriminatory reason and that judgeship is precleared (initially or at some later time), a claim can be brought under Section 2(a) of the Voting Rights Act contending that there was purposeful discrimination. *See* 42 U.S.C. § 1973(a). Such a claim would lie even if the Supreme Court affirms the Fifth Circuit's decision in *LULAC* that the "results test" set forth in Section 2(b) is inapplicable to the judiciary. *See* 914 F.2d 620 (5th Cir. 1990) (*en banc*).

B. The Three-Judge Court Correctly Concluded That Certain Other Acts Have Been Precleared

There were four other situations concerning which the three-judge court held that judgeships have been precleared. Two situations involved appellate judgeships and two involved district judgeships. These will be addressed in turn.

1. Appellate Judgeships

The appellants contend that the division of the First Circuit into districts has not been precleared. The three-judge court found, however, "that when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits." 751 F. Supp. at 598, J.S. App. 52a. Louisiana's preclearance request for Acts 1981, No. 3, of the Louisiana Legislature is in the Joint Appendix. *See* J.A. 155-99. Section 3 of the Act stated that "there shall be separate and distinct divisions within each district of the various courts of appeal." J.A. 174. Section 6 provided that the First Circuit would have twelve judges and that "[f]our judges shall be elected from each of the three districts composing the circuit by the qualified electors of each district, respectively." J.A. 181. Section 7(a) stated that "There shall be four court of appeals districts, which shall each be divided into districts as follows." J.A. 184.[20] The

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[20] The concept of divisions within the First Circuit, and the determination of which parishes are in each division, dates back to Acts 1958, No. 561, which, once approved by the electorate, amended Article 7, § 20 of the Louisiana Constitution of 1921. With the enactment of the 1974 Louisiana Constitution, this provision, like many others, was taken out of the Constitution and put into a statute. *See* La. Const. art. 14, § 16(A)(5).

three-judge court correctly concluded that the division of the First Circuit, like the division of each of the other circuits, has been precleared.

The appellants also object to two at-large judgeships, one in the Second Circuit and one in the Third Circuit. Once again, as the three-judge court found, preclearance of Acts 1981, No. 3, constituted approval of these at-large judgeships. 751 F. Supp. at 598, J.S. App. 52a. Section 8 of the Act provided that in the Second Circuit "[o]ne judge shall be elected from the circuit at large by the qualified electors thereof." J.A. 189. Further, a chart submitted to the Justice Department as part of the State's letter of August 26, 1981, refers to the existence of the at-large seats in the Third Circuit. J.A. 159.

2. Judicial Districts

The other two situations involved judicial districts. First, the appellants complain that the division of the Tenth Judicial District into the Tenth and Thirty-Ninth Judicial Districts was not precleared. Acts 1979, No. 635, created a new judicial district and provided for a special election for approval of this change by the voters in the former Tenth Judicial District. The Attorney General approved the special referendum election, the *sole* purpose of which was to divide the district into the two contemplated districts. J.A. 101. The referendum asked whether the voters were "FOR" or "AGAINST":

> the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Red River Parish, and continuing the Tenth Judicial District composed on Natchitoches Parish as provided by . . . the 1979 Regular Session of the Louisiana Legislature.

Acts 1979, No. 635, § 8. Upon approval by the voters, the judicial district would automatically be split with Red River Parish comprising one judicial district and Natchitoches Parish the other. Acts 1979, No. 635, § 9.[21] The three-judge court correctly ruled that this approval constituted preclearance of the two districts. 751 F. Supp. at 598, J.S. App. 52a. Certainly, it would be illogical to preclear having a special election to approve dividing a judicial district into two parts if the division itself was objectionable.

The appellants contend that *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978), held that approval of a referendum does not constitute approval of the change sought to be brought about by the referendum. The situation in *Sheffield* was very different from that presented here. In *Sheffield* the city sought preclearance of a referendum to determine whether the commission form of government should be abandoned for a mayor/alderman form of government. *Id.* at 114. The Attorney General responded two months later (after the referendum was held), stating that he had no objection to a referendum but that preclearance would be necessary for the change to a mayor/council form of government. Further, he needed information concerning the type of aldermanic form of government as it existed in 1912, the number of aldermen to be elected, the terms and qualifications for the mayor and aldermen, whether the aldermen were to be elected at large or by wards, whether

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[21] No one has been able to find the letter requesting preclearance, although the letter granting preclearance begins on J.A. 101. Given that the same act provides for the referendum and for the actual splitting of the judicial district, presumably the act was sent to the Justice Department. Otherwise, the Justice Department would no doubt have asked for a copy.

there were numbered post, residency, majority vote or staggered term requirements, and whether single shot voting was prohibited. *Id.* at 115. When Sheffield explained its changes, the Attorney General objected to election of the city councilmen at-large. *Id.* at 116. A three-judge court held, *inter alia*, that preclearance of the referendum constituted preclearance of the governmental change. *Id.* at 116. This Court reversed, noting that Sheffield did not and could not have sought preclearance of the change in form of government when it submitted the referendum because "the details of the change had not yet been worked out." *Id.* at 137. Further, the Attorney General wrote back and stated that, although he had no objection to the referendum, he did need additional information to preclear the governmental change. *Id.*

While the referendum in *Sheffield* was for a complicated change in the form of government which would necessitate substantive decisions as to structure of the government, here the sole purpose of the referendum was to split a judicial district composed of two parishes into two judicial districts each of which would have one parish, with one judge to be elected in each. The nature and specifics of the change were thus set forth in the referendum, and preclearance of that referendum (without questions by the Justice Department concerning the nature of the change as occurred in *Sheffield*) constituted preclearance of the split in judicial districts.

Finally, the appellants state that the Attorney General did not approve the addition of a judge in the Twentieth Judicial District. The State asked for preclearance of a referendum to be held in that judicial district and asked for approval of a new judge. J.A. 123. The Attorney General approved the additional judgeship. Accordingly,

the three-judge court determined "that the split of District 20 into two parishes and the creation of District B was expressly submitted and approved by the Attorney General. 751 F. Supp. at 598, J.S. App. 53a.

II. THE JUSTICE DEPARTMENT CANNOT USE SECTION 5 OF THE VOTING RIGHTS ACT TO FORCE A CHANGE IN THE LOUISIANA "SYSTEM" OF ELECTING JUDGES WHICH PREDATES THE ACT.

Section 5 of the Voting Rights Act is possibly the most extreme intrusion into state authority (or rather into the authority of certain states) of any statute enacted by Congress. This Court has described Section 5 as "certainly the most extraordinary" remedial provision of the Voting Rights Act, *McCain v. Lybrand*, 465 U.S. 236, 244 (1984), and "an uncommon exercise of Congressional power." *Briscoe v. Bell*, 432 U.S. 404, 414 (1977), *quoting South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).[22] Section 5 reflects a "radical departure from traditional notions of constitutional federalism, a departure several Members of this Court have regarded as unconstitutional." *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 48 (1978) (Powell, Burger, & Rehnquist, JJ., dissenting).[23]

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[22] Chief Justice Rehnquist has spoken of "the unreasonably burdensome and unrealistic control which the Federal Government routinely exercises over state and local governments under the Voting Rights Act." *Blanding v. Dubose*, 454 U.S. 393, 401 (1982) (Rehnquist and Powell, JJ., concurring).

[23] Opinions expressing doubts as to the constitutionality of § 5 include *South Carolina v. Katzenbach*, 383 U.S. 301, 356-62 (1966) (Black, J., concurring and dissenting), *Allen v. Board of*

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Because § 5 is so intrusive, it should be read and interpreted with care. Justice Stevens has noted that

> [e]ven the Department of Justice has described [§ 5] as a "substantial departure . . . from ordinary concepts of our federal system;" its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care.

United States v. Board of Commissioners of Sheffield, 435 U.S. 110, 140 (1978) (Stevens, Burger, and Rehnquist, JJ., dissenting).

Such a careful reading and interpretation shows that Congress intended by enacting Section 5 of the Voting Rights Act to "freez[e] the election laws of the covered States unless a declaratory judgment is obtained in the District of Columbia holding that a proposed change is without discriminatory purpose or effect." *Georgia v. United States*, 411 U.S. 526, 538 (1973). "Congress adopted § 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 121 (1978).[24] "[D]iscriminatory practices . . . instituted prior

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Elections, 393 U.S. 544, 586 n.4 (1969) (Harlan, J., concurring and dissenting); *City of Rome v. United States*, 446 U.S. 156, 193 (1980) (Powell, J., dissenting).

[24] Similarly, Justice Brennan has stated that "Section 5, of course, was intended to prevent [certain] States . . . from . . . continually contriving *new* laws to deprive blacks of any newly won voting rights." *Berry v. Doles*, 438 U.S. 190, 195 (1978) (Brennan and Marshall, JJ., concurring) (emphasis supplied).

to November 1964 . . . are not subject to the requirement of preclearance [under § 5]." *Beer v. United States*, 425 U.S. 130, 138 (1976), *quoting* U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After*, 347.

In this case, however, the Justice Department is attempting to impermissibly rewrite Section 5 to attack Louisiana's long-standing practice of electing judges at-large. There is no real contention by the Justice Department that there is anything wrong with having a fifth judge in a judicial district, or that Louisiana had some nefarious motive in proposing such a fifth judge. Instead, the Justice Department wants Louisiana to scrap the at-large system of electing the judiciary in favor of some other method of electing judges such as sub-districts, limited voting, or cumulative voting. In essence, the Justice Department is attempting to "unfreeze" the method of electing judges in Louisiana.

The three-judge court found that Louisiana had been electing district judges on an at-large basis and circuit court judges on both a division and an at-large basis "[b]oth prior to and subsequent to the Voting Rights Act of 1965." 751 F. Supp. at 588, J.S. App. 4a.[25] After having

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[25] Louisiana's at-large system of electing judges has been in effect since 1946, *see* LA. R.S. 13:582-585, thus predating by two decades the Voting Rights Act of 1965. 42 U.S.C. § 1973. Delegates to the Louisiana Constitutional Convention held in 1973 "overwhelmingly voted to retain the concept of electing district judges on a district-wide, at-large basis and electing court of appeal judges by circuit." 751 F. Supp. at 588, J.S. App. 5a. The 1974 Louisiana Constitution was precleared by the Justice Department. *Chisom v. Edwards*, 690 F. Supp. 1524, 1525 & n.4 (E.D. La. 1988). Further, the Louisiana Election Code, Acts 1976, No. 697; La. R.S. 40: 401 *et seq.*, which provides for a majority vote requirement, La. R.S. 40:511, 512, was also precleared on October 19, 1976.

granted preclearance "approximately 81 times," the Justice Department abruptly shifted position and refused to preclear new judgeships after Judge Parker rendered his initial decision in this case that Louisiana's method of electing judges violated Section 2 of the Voting Rights Act. 751 F. Supp. at 593 n.41, J.S. App. 29a n.41; *see Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988).

Thereafter, the Justice Department suddenly refused to preclear new judgeships. 751 F. Supp. at 593 n.41, J.S. App. 29a n.41. The first letter evidencing this change in position was written on September 23, 1988. J.S. App. 108a. *Nothing* in that letter focused on the motive of the Louisiana Legislature in adding the judgeships for which preclearance was sought. Instead, the Department refused approval because Louisiana was "seeking to add elective judgeship positions under an election system that has been found to violate Section 2 of the Voting Rights Act." J.S. App. 111a.

A subsequent Justice Department letter, dated May 12, 1989, also refused to preclear several additional judgeships. J.S. App. 127a. Once again, the Department did not base its objections on any problems with the submitted acts. Indeed, the letter precleared the portion of Acts 1985, No. 56, which added a district judge in the Twelfth Judicial District, but refused preclearance of other portions of the same act which provided for several other additional judgeships and the splitting of two judicial districts. Rather than examining the proposed changes, the Department refused preclearance because of the existence of Louisiana's "at-large system with designated posts and a majority vote requirement." J.S. App. 132a. That "system," however, was not changed in any way by the submitted act.

The third refusal to preclear additional seats occurred on September 17, 1990. On that date the Justice Department issued two letters. One letter precleared additional judgeships in Orleans Parish. J.S. App. 136a. The Department stated that "the changes do not have the purpose and will not have the effect of discriminating on the basis of race or color and that implementation of the changes will not lead to a clear violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973." J.S. App. 139a. Strangely enough, the same acts precleared by this letter had earlier been denied preclearance in the September 23, 1988, and May 12, 1989, letters discussed above. J.S. App. 125a, 127a.

In a separate letter also dated September 17, 1990, the Justice Department refused to change its position concerning the previous additional judgeships sought to be precleared and refused to approve other additional judgeships. J.S. App. 142a. The Department refused to permit certain additional judgeships sought by Act 8 of 1990, although another letter dated the same day did preclear other judgeships added by that same legislation. *Compare* J.S. App. 142a, 160a, 166a *with* J.S. App. 136a. In this letter the Department made quite clear that its objections were not based on any suspicion of invidious motive of Louisiana in adding the judgeships; indeed, it stated that "we do not in any way question the State's need for or purpose in creating new judgeship positions." J.S. App. 159a.[26] Instead, the Department focused its

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[26] As the three-judge court found,

> All parties to this litigation concede that the legislature added positions to the various district courts and the courts of appeal because the caseload required such. There are no allegations that the

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disapproval on Louisiana's "system" of electing judges, contending that "the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the *Clark* court has given the State ample opportunity to do so." J.S. App. 153a. Thus, because Louisiana chose to exercise its legal right to litigate alleged Section 2 violations in parts of Louisiana, the Justice Department decided to prevent Louisiana from adding much needed judgeships.[27]

The cited letters provide indisputable evidence that the Justice Department is focusing not on *changes* in Louisiana's statutes, but on opposition to long-standing

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> additional judges were added in a racially discriminatory manner. It is the concept of electing judges on an at-large basis that is the subject of the discrimination charge in this case.

751 F. Supp. at 595 n.50, J.S. App. 37a n.50.

[27] Louisiana's decision to contest this lawsuit was certainly well-founded. In his initial decision on liability, Judge Parker found that the three factors set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), could be met only in some of the judicial districts and court of appeals districts in Louisiana. *See Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). After the remedy trial, Judge Parker reversed himself in part and held that the plaintiffs had not proven violations after all in fourteen judicial districts concerning which he had initially found violations. Moreover, he determined that there was a violation in only one district of one court of appeal. *Clark v. Roemer*, Remedy Opinion. Ultimately, after the Fifth Circuit's decision in *LULAC*, Judge Parker dismissed the entire Section 2(b) claim. *Clark v. Roemer*, Order October 19, 1990 (M.D.La.) (unreported). That decision has been appealed to the United States Court of Appeals for the Fifth Circuit, Docket No. 90-3785, and certiorari has been sought in this Court, No. 90-898.

Louisiana practices that predate the Voting Rights Act.[28] Further evidence is provided by the Justice Department's conduct regarding the Sixth Judicial District. In its September 17, 1990, letter, the Justice Department refused to preclear an additional judgeship for that judicial district. J.S. App. 163a. The election for that judgeship took place on October 6, 1990, pursuant to the three-judge court order, and a black won. Thereafter, on November 20, 1990, the Justice Department precleared the previously unapprovable seat even though *no* request for preclearance of that seat was pending. J.S. App. 184a.

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[28] Indeed, the Justice Department, in distinguishing Louisiana's statutory scheme for the election of judges from that of Mississippi, has previously conceded in a sworn interrogatory answer that the allegedly objectionable aspects of the Louisiana statutes at issue here (*i.e.*, the use of at-large elections, a majority-vote requirement, and designated divisions) do not constitute "changes" for purposes of Section 5:

> On several occasions the Attorney General has precleared Louisiana statutes which added judges to existing districts and provided that these judges would be elected at large, districtwide. Although these statutes denominate numbered posts for each such judge, a statute of general application antedating the Voting Rights Act required that each such judge be elected by a numbered post so that such designation of positions was not a change subject to the Section 5 preclearance requirement.

United States Response to State of Mississippi's First Set of Interrogatories to Defendant, *State of Mississippi v. United States*, C.A. No. 87-3464 (D.D.C. filed April 8, 1988), at pp. 15-16 (reproduced herein at App. 2-3). Judicial notice can be taken of such an answer. *See, e.g., Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977); *Mobil Oil Corp. v. Tennessee Valley Authority*, 387 F. Supp. 498, 515 n.41 (N.D. Ala. 1974).

Although the initial decision in *Clark* apparently gave the Justice Department impetus to refuse to approve Louisiana statutes adding judgeships, the Department continued to refuse preclearance after the Fifth Circuit's *en banc* decision in *LULAC* and after Judge Parker's dismissal of the § 2 claims in this case. This refusal constitutes a blatant misuse of § 5, which nowhere gives the Justice Department the right to prevent implementation of statutes because it does not like a system in place before the Voting Rights Act of 1965. Further, the Justice Department's opposition to the Louisiana election "system" ignores the decision in this case that the Louisiana "system" of electing judges cannot violate Section 2, *Clark v. Roemer,* Remedy Opinion p. 3, and ignores the Fifth Circuit's decision in *LULAC*.[29]

By insisting that Louisiana change its "system" of electing judges if it is to have additional judges, the Justice Department also is ignoring this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986), that any remedy under Section 2 must be district-specific and not systemic. In holding that a "systemic" remedy is appropriate, the Justice Department cited as authority Judge Parker's statement in his opinion on liability in this case that the solution was to

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[29] In a letter dated November 20, 1990, the Justice Department refused to reconsider its opposition to the Louisiana "system" of electing judges despite the *LULAC* decision "that the Section 2 results standard does not apply to judicial election systems." J.S. App. 180a. In refusing to change its position, the Justice Department noted that *LULAC* "expressly recognized" that Section 5 applies to the judiciary. J.S. App. 180a. The Justice Department ignored the fact that its stated reason for opposition under Section 5 to additional judgeships in Louisiana was based *solely* on its belief that the Louisiana "system" of electing judges violated Section 2. *See* J.S. App. 160a, 176a.

"revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285, 303 (M.D. La. 1988). Judge Parker, however, reversed himself after the remedy trial, holding that the court "lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to 'guilty' districts." *Clark v. Roemer,* Remedy Opinion p. 3. Despite this reversal, the Justice Department still holds firm to the position rejected in *Gingles* that Louisiana must adopt a "systemic" remedy.

The Justice Department's refusal to preclear the additional Louisiana judgeships also violates the Department's internal rule requiring that preclearance determinations be guided by relevant federal judicial decisions. *See* 28 C.F.R. ch. 1 (7-1-89 Edition) § 51.56. Relevant judicial decisions ignored by the Justice Department include the decision in this case, the Fifth Circuit's decision in *LULAC*, and this Court's decision in *Gingles*.[30]

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[30] On October 17, 1990, Louisiana filed a Motion Asserting Constitutional Challenge with accompanying memorandum. The memorandum noted that the Justice Department's application of § 5 to forbid Louisiana from adding judgeships to an at-large, majority vote, designated post system was unconstitutional as applied because the Justice Department had approved the same type of judicial election system in Alabama and Texas. The Lawyers' Committee for Civil Rights (counsel for appellant in this case) had objected to preclearance of Alabama statutes providing for election of judges because such statutes provided for the election of judges at-large, by numbered posts, with a majority vote requirement. *See* Memorandum in Support of Constitutional Challenge, pp. 3-4. Nevertheless, the Justice Department approved those Alabama acts. Memorandum in Support of Constitutional Challenge Ex. 3. Ultimately,

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The Justice Department contends that it is above (or outside) of the law as established by this and other courts and that its decision not to preclear these judgeships is unreviewable by any court. *See* Brief p. 23 n.19. Such an astonishing declaration is simply not the law, and the Justice Department's conduct in this case illustrates why such a principle ought not be the law. In *Georgia v. United States*, 411 U.S. 526 (1973), the Court determined the standard by which the Attorney General could object to implementation of a statute. Although members of the Court disagreed as to the proper standard, the Court unanimously rejected the Government's argument that the propriety of the objection was "outside the permissible scope of judicial inquiry." *Morris v. Gressette*, 432 U.S. 491, 516 (1977) (Marshall and Brennan, JJ., dissenting).

Thereafter, in *Morris v. Gressette*, 432 U.S. 491 (1977), a majority of the Court held that there could be no judicial review of the Attorney General's failure to interpose a timely objection under § 5:

> Nothing in our opinion in *Georgia v. United States* suggests that Congress did not intend to preclude judicial review of the Attorney General's failure to interpose an objection within 60 days of a complete submission. . . . Indeed, subsequent judicial review of the Attorney General's failure to interpose a timely objection to a complete submission would itself "add acrimony" by denying covered jurisdictions the statutorily prescribed "rapid method of rendering a new state election law enforceable."

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the three-judge court dismissed the Motion, holding that any such constitutionality challenge must be raised in the district court for the District of Columbia. *Clark v. Roemer*, Ruling on Motions (three-judge court) (February 22, 1991).

432 U.S. at 504 n.19, *quoting Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969). The Court did not overrule its decision in *Georgia*. *See Morris v. Gressette*, 432 U.S. 491, 516 (1977) (Marshall and Brennan, JJ., dissenting).

Holding that failure to take timely action is not subject to review is very different from holding that the Attorney General's decision to ignore rulings of this Court, the Fifth Circuit, the district court, and Justice Department regulations is unreviewable.[31] Justice White stated in *Georgia*, "Surely, objections by the Attorney General would not be valid if that officer . . . simply decided to object to all of [the § 5 submissions], to one out of 10 of them or to those filed by States with governors of a different political persuasion." *Georgia v. United States*, 411 U.S. 526, 543 (1973) (White, Powell, and Rehnquist, JJ., dissenting). Similarly, an objection is invalid if it rests on an illegal basis, such as the dislike of a State's pre-1965 election system. Allowing the Justice Department to refuse preclearance at its whim for reasons not contemplated by Section 5 means that determinations as to preclearance will depend on the prevailing political winds in the Justice Department.

A three-judge court in another judiciary voting rights case has severely criticized the Justice Department for ignoring judicial decisions when refusing preclearance:

> We close by expressing our concern at the actions taken, and the position expressed, by the

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[31] The Justice Department also cites this Court's *per curiam* decision in *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977). There is no intimation in that case that the Justice Department was refusing preclearance in defiance of judicial decisions, its regulations, and the Congressional decision that § 5 preclearance relates to *changes* in voting practices, not to review of pre-1965 voting practices.

Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. . . .

Despite [the *en banc* Fifth Circuit's] plain ruling [in *LULAC*], the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2 . . . . " During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible latter resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

. . . .

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through

> adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

Mexican American Bar Association of Texas v. Texas and *United States v. Texas, et al.*, Numbers 90-CA-171 and A-90-CA-1018 pp. 13-15, WL 252313 (Consolidated) (three-judge court) (W.D. Tex. December 26, 1990), *appeal docketed*, 59 U.S.L.W. 3615 (U.S. Feb. 27, 1991) (90-1352).

The Justice Department is attempting to make Louisiana change to a system of electing judges by sub-districts or by limited voting or cumulative voting. *See* J.S. App. 119a. Each proposed system is unworkable and undesirable. Electing judges by sub-district would create a system of "neighborhood judges" elected in small geographic areas. Before the Fifth Circuit's decision in *LULAC*, Judge Parker held that sub-districts would be the remedy for the Section 2 violations in this case. *Clark v. Roemer*, Remedy Opinion p. 52. Judge Parker was quick to point out some of the problems inherent in such a remedy:

> Creation of such sub-districts obviously generates other problems, such as compactness, equality of population, need for future modification because of additional judgeships or population changes and the potential or perceived potential for small election districts leading to "home town" justice, to name a few.

Clark v. Roemer, Remedy Opinion p. 49.

Possibly the most difficult problems to solve involve the "need for future modification because of additional judgeships or population changes." The proposed sub-districts were based on population and voting age population figures. Changes in population and the racial composition of population in sub-districts will inevitably occur. Thus, what may be a minority sub-district today may not be a minority sub-district tomorrow, requiring

periodic redrawing of sub-district lines. Indeed, because the proposed sub-districts were based on 1980 census figures, they are already obsolete. Further, judges may fear that as further redrawings occur, they will be placed in the same sub-district and forced to run against each other. They might therefore vie with one another to make sure that they do not write unpopular opinions.

Additional redrawing of sub-districts will be necessary as judges are added. Most governmental bodies (such as city councils, county governments, school boards, and the like) remain the same size. Judges, however, are added as the caseloads increase. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). If judges are elected from single-member sub-districts, each time a judge is added in a judicial district, all of the sub-districts will have to be redrawn.[32]

Because the electorate for a sub-district will be much smaller than the electorate for a judicial district, there will be the appearance (and possibly the reality) of "neighborhood judges" who are influenced by their constituency and the source of their campaign funds. Because of a fear of "home-town cooking," litigants may understandably opt more often for jury trials, clogging the court docket and slowing down the judicial process, as well as creating the need for more judges. And, as judges are added, lines will need to be re-drawn making the sub-districts smaller, which then increases the "neighborhood judge" problem so that more litigants opt for a

[32] Even with multi-member sub-districts, as a judge is added, the population per judge across the sub-districts within that district will no longer be approximately equal, so the lines will have to be withdrawn.

jury – in short, creating a vicious (and extremely expensive) circle.

The Justice Department also stated that Louisiana could adopt a system of limited voting, under which a voter can only vote for some of the positions on the ballot. Such a system would itself appear to violate the Voting Rights Act, which provides that nothing in the applicable subchapters "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C. § 1973n.[33] Limited voting was rejected as a judicial remedy in Voting Rights Act cases, including *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988), and *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).[34] Further, Judge Parker rejected it as a Section 2 remedy in this case, after hearing uncontested testimony that it exists in only approximately 200 of the more than 86,000 local governmental units in this country. *Clark v. Roemer*, Remedy Opinion pp. 51-52.[35] Under cumulative voting a voter can vote more than once for a single position on the ballot. Thus, if there were eight judgeships for which elections were being held, all eight

[33] Judge Parker rejected limited voting as a remedy, stating "this court finds it difficult to comprehend how we expand access to the ballot box by limiting the number of votes each elector may cast." *Clark v. Roemer*, Remedy Opinion p. 52.

[34] Pennsylvania has determined that limited voting for judges violates its Constitution. *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983).

[35] Testimony was adduced at the remedy trial of this case concerning workability problems of limited voting. This evidence is summarized in the Posttrial Brief on Behalf of the State of Louisiana, March 5, 1990, pp. 40-46.

votes could be cast for one judicial candidate. Cumulative voting has been characterized as a form of proportional representation, which is, of course, forbidden under § 2(b). Grofman, "Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues" 107, 121-22 in B. Grofman, A. Lijphart, R. McKay, & H. Scarrow (eds.), *Representation and Redistricting Issues* (Lexington Books 1982).

Even if, however, the State of Louisiana were to adopt limited voting or cumulative voting for the unprecleared judgeships and even if the Justice Department approved this method of election, such a method of voting would not be workable. The majority of the unprecleared judgeships are situations in which one judgeship has not been precleared in a judicial district, although all of the other judgeships have been precleared.[36] Given that limited voting means a voter must vote for less than all of the seats to be elected, there is no way for a voter to vote for less than one judgeship and thus no way to "limit" the voting population. Similarly, there is no way to "cumulate" one vote. Either remedy would also be unworkable even in the few districts where more than one judgeship was not precleared. Explaining to voters that they could vote for all of some judgeships (the precleared judgeships) but only a limited number of the other judgeships (the unprecleared judgeships) would be an impossible task. Alternatively, instructing voters

[36] This situation exists in the First, Fourth, Sixteenth, Eighteenth, Twenty-First, Twenty-Third, Twenty-Seventh, Twenty-Ninth, and Thirty-Ninth Judgeships, as well as in the Second and Third Circuits. *See Clark v. Roemer*, Order of the Three-Judge Court, October 22, 1990, J.S. App. 68a, 70a-71a.

that they could vote one time for each of some judgeships (the precleared judgeships) but could cumulate their votes for one or more of the other judgeships (the unprecleared judgeships) would be just as difficult. In short, using either system for the unprecleared judgeships (which are the only judgeships that can violate Section 5) would create a smorgasbord of an election system with varying scenarios, the impracticability of which is obvious. The time-honored system of electing judges in Louisiana, to which the Justice Department cannot object under Section 5, is certainly much more workable and desirable.

III. THE THREE-JUDGE COURT WAS CORRECT IN DETERMINING THAT ELECTIONS FOR CERTAIN UNPRECLEARED JUDGESHIPS SHOULD GO FORWARD AND THAT THE WINNERS SHOULD SERVE "PROVISIONALLY."

The appellants argue that the three-judge court erred in permitting the November 6, 1990, and December 8, 1990 elections to be scheduled for positions which the court held had not been precleared. 751 F. Supp. at 590-91, J.A. App. 14a-17a. This Court overruled the three-judge court and enjoined the elections. ___ U.S. ___, 112 L.Ed.2d 390 (1990). Louisiana is now seeking in the district court of the District of Columbia to have those positions precleared. Therefore, the question of whether these elections should have been held in November and December 1990 is moot.[37] Nevertheless, as the appellants

[37] The United States in its *amicus* brief states that this is not moot because the elections could be rescheduled. The elections were originally scheduled by the three-judge court.

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have posed the question whether the three-judge court erred, this brief will argue that the three-judge court correctly exercised its discretion in allowing the elections.

The three-judge court engaged in a delicate balance in determining to hold the elections, carefully weighing the interests of Louisiana citizens, Louisiana voters, the plaintiffs, state and local officials, judicial candidates, litigants, and the Louisiana criminal justice system. 751 F. Supp. at 594-95, J.S. App. 36a-39a. First, the court recognized that "the [appellants'] request for an injunction of the unprecleared judicial positions came very close to the October 6 election day." 751 F. Supp. at 594, J.S. App. 33a-34a.[38]

The three-judge court also noted that the *LULAC* decision had recently been rendered, and that thereafter Judge Parker had dismissed the Section 2 claims. Further, at the time of the hearing, this Court had not issued its summary affirmance in *Brooks v. Georgia State Board of Elections*, ___ U.S. ___, 112 L.Ed.2d 243 (1990), which case posed for the first time whether Section 5 applied to the mere addition of judgeships. 751 F. Supp. at 594, J.S. App. 34a-35a.[39]

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One doubts that the three-judge court would reschedule them in the face of this Court's reversal, especially given that part of the reason for allowing the elections was that the campaign was underway and that the election was scheduled when there would be other major elections so as to ensure high voter participation. 751 F. Supp. at 594, J.S. App. 33a-34a.

[38] *See* page 43 *infra*.

[39] This Court has stated that in determining relief in a Section 5 case a court should consider whether the law is settled. *Perkins v. Matthews*, 400 U.S. 379, 396 (1971).

The three-judge court cited decisions of this Court allowing elections under an unprecleared statute to stand pending the authority involved seeking approval. *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971); *Berry v. Doles*, 438 U.S. 190, 192 (1978).

In *Georgia v. United States*, 411 U.S. 526 (1973), the three-judge court held that Section 5 preclearance had not been received from the Attorney General or the district court for the District of Columbia. *Id.* at 527. Accordingly, the three-judge court enjoined the pending elections. *Id.* This Court, however, allowed the elections to occur. *Id.* After hearing the resulting appeal and affirming the three-judge court, this Court still did not invalidate the elections held under an unprecleared plan. *Id.* at 541.

United States v. County Commission, Hale County, 425 F. Supp. 433 (S.D. Ala. 1976) (three-judge court), *aff'd mem.*, 430 U.S. 924 (1977), involved an order very similar to the one issued by the three-judge court here. There the Justice Department sought to enjoin pending County Commissioner elections in Alabama because they were to be elected under an unprecleared at-large plan. 425 F. Supp. at 434. The three-judge court nevertheless allowed elections to be held two and one half weeks thereafter, stating that the persons elected would serve "provisionally." *Id.* at 436. The decision of the three-judge court was affirmed by this Court.[40] An election with provisional winners was

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[40] The Justice Department in its *amicus* brief states that this Court's affirmance in *Hale County* was not a judgment on the merits of the remedy, and that "[t]he published opinion gives no indication that the validity of the remedy was at issue between the parties." p. 18 n.15. Of course, the plaintiff party

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also allowed in *Moore v. LeFlore County Board of Election Commissioners*, 351 F. Supp. 848 (N.D. Miss. 1971) (three-judge court).

IV. JUDGES ELECTED DURING 1990 TO UNPRECLEARED POSITIONS SHOULD NOT BE REMOVED FROM OFFICE.

Some persons ran unopposed for judgeships and were declared elected at the end of the qualifying period. Others won an absolute majority in the initial election held on October 6, 1990. Although the appellants filed a request for an injunction in July 1990, no hearing was scheduled until long after the qualifying period had ended and shortly before the October 6, 1990 election. The three-judge court denied the request to enjoin the election, and no appeal was made to this Court. All individuals who were elected have been given their judicial commissions and are serving as judges.

The appellants have made no attempt in the three-judge court to unseat these judges.[41] Justice Powell has

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in that case was the very same Justice Department. If the Justice Department was opposed to the concept of election of provisional winners in unprecleared positions, one would think it would have appealed to this Court and made "the validity of the remedy . . . a[n] issue between the parties."

[41] Indeed, counsel of record for the appellants stated at a December 20, 1990, hearing that he would not be seeking action by the three-judge court to unseat those judges:

> MR. McDUFF: Now, in all candor, with respect to the first category of judgeships that were elected either in July without opposition or on October 6th, the Supreme Court did not specifically enjoin them

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commented that raising the issue of remedy in this Court initially is untimely: "As a general rule, this Court does not and should not allow parties or amici to raise issues here that were not raised in or ruled upon by the lower courts. Neither should this Court encourage parties to bypass avenues of relief that are open to them in the lower courts." *Berry v. Doles*, 438 U.S. 190, 199 (Powell, J., concurring in the judgment).

Moreover, this Court has held that the local three-judge court should determine the proper remedy in a Section 5 case. For example, in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), the Court stated:

> As we noted in *Perkins v. Matthews*, a local district court is in a better position than this Court to fashion relief, because the district court "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence.

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> from taking office in its injunction. And in the Hunter case which was a case coming out of Monroe City Court which we asked the Supreme Court to enjoin people from taking office after they had been elected because the timing was such that an application was not made to the Supreme Court for election, and they turned us down on a seven to two vote.
>
> So, to me that means that the Supreme Court did not specifically, in this case, enjoin the people elected in July through qualification or October 6th from taking office. So we are not going to take the position in this court that they should be kept from taking office. We do think, of course, it is still an unprecleared judgeship and that eventually something further is going to happen with it.

Transcript of Hearing in *Clark v. Roemer*, December 20, 1990.

457 U.S. at 270 (citations omitted). Louisiana submits that the three-judge court should address the question of remedy, taking evidence as to the proper remedy for the unprecleared judgeship in each affected district.[42]

This Court has in the past refused to set aside elections held under statutes that have not been precleared, holding that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971); *accord, Berry v. Doles*, 438 U.S. 190 (1978); *Allen v. Board of Elections*, 393 U.S. 544, 571-72 (1969).[43]

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[42] In its *amicus* brief the United States has recognized that the proper remedy may vary from district to district, and agreed that elections should not be set aside if there is "a demonstration that the seats involved must be filled and that no alternative means of filling them is practicable." p. 28.

[43] This Court has taken varying positions as to whether the "approval" to be sought was (a) from the Justice Department only, or (b) from either the Justice Department or the district court in the District of Columbia. In *Allen*, the Court refused the Solicitor General's suggestion that the elections should be set aside "if the State does not promptly institute § 5 approval proceedings." 393 U.S. at 571. Justice Harlan stated that they should be set aside "[u]nless Mississippi promptly submits its laws to either the Attorney General or the District Court for the District of Columbia." 393 U.S. at 594 (Harlan, J., concurring and dissenting). *Perkins* mentioned "federal approval." 400 U.S. at 396. *Berry* referred to submission "to a forum designated by Congress" for "approval." 438 U.S. at 192-93. Finally, in *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-3 (1985), the Court required submission

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In *Berry v. Doles*, 438 U.S. 190 (1978), an action was filed in a three-judge court shortly before a primary election to enforce the requirements of § 5 and to prevent the pending election. The requests for declaratory and injunctive relief were not acted upon until after the scheduled primary election and the subsequent run-off election. The three-judge court afforded prospective relief only by enjoining further enforcement of the statute but did not set aside the results of the elections. On appeal, this Court refused to void the elections, holding:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election.

438 U.S. at 192-93.

Even more recently, in October, 1990, a three-judge court refused to enjoin plaintiffs' request to enjoin a City Court election in Monroe, Louisiana, based on the failure to obtain preclearance. *Hunter v. City of Monroe*, Docket No. 90-2031 (W.D. La. November 7, 1990) (three-judge court) (unreported opinion). Like the appellants here, the plaintiffs in that case did not appeal denial of the

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to the Attorney General for his approval, failing which the results of the election would be set aside. The Justice Department recognized this varying treatment in its *amicus* brief in this case. p. 17 n.14.

injunction to this Court. Instead, two weeks after the election, they filed a Motion for Reconsideration, Certification, and Comprehensive Relief. The three-judge court allowed certification of the winners. Thereafter, the plaintiffs filed an Application for Stay and Injunction Pending Appeal with this Court, which application sought to prevent the elected judges from taking their seats. No. A-363. Circuit Justice Scalia turned the application over to the entire Court, which denied the request 7-2. *Hunter v. McKeithen*, ___ U.S. ___, 112 L.Ed.2d 517 (1990). An appeal from the three-judge court decision is pending in this Court. *Hunter v. McKeithen*, No. 90-1187.

Appellees submit that the decision by this Court in *Hunter* is applicable here. Indeed, the argument against throwing these judges out of office is even stronger because these judges have already been seated and are acting on a heavy docket of cases.

In *Georgia v. United States*, 411 U.S. 526 (1973), this Court determined that even though § 5 was applicable to the reapportionment plan at issue, "it would be inequitable to require new elections at this time." 411 U.S. at 541. The Court reasoned that elections had been conducted under a disputed plan by reason of the Court's stay order. Here the elections were conducted under orders of the three-judge court, and neither the appellants nor the Justice Department sought an injunction of these elections by this Court. Under these circumstances the elections should stand.

One important factor to be considered in determining whether to invalidate elections is "whether it was reasonably clear at the time of the election that the changes were covered by § 5." *Perkins v. Matthews*, 400 U.S. 379, 396 (1971). The Fifth Circuit held in *LULAC* that § 2 of the Voting Rights Act does not apply to the judiciary. 914 F.2d 620 (5th Cir. 1990) (*en banc*). The three-judge court held in

this case that § 5 of the Voting Rights Act is applicable to certain additional judgeships, but that pending elections for those judgeships should nevertheless go forward. 751 F. Supp. at 590-91, J.S. App. 14a-15a. This Court, however, enjoined such elections. *Clark v. Roemer*, ___ U.S. ___, 112 L.Ed.2d 390 (1990), *modified*, ___ U.S. ___, 112 L.Ed.2d 391 (1990). The three-judge court in *Hunter v. City of Monroe* held that § 5 of the Voting Rights Act does not apply to the "addition of more judges, to be elected by the same voters who elect the present judges, and whose jurisdiction will be exactly the same as that of the existing judges." Docket 90-2031 (W.D. La. November 7, 1990) (three-judge court) (unreported opinion). This Court refused to grant an injunction sought by the petitioners to prevent the elected judges from taking their seats. *Hunter v. McKeithen*, ___ U.S. ___, 112 L.Ed.2d 517 (1990). In *Brooks v. Georgia State Board of Elections*, No. C.V. 288-146 (S.D. Ga. Dec. 1., 1989) (three-judge court), *aff'd mem.*, ___ U.S. ___, 112 L.Ed.2d 243 (1990), a federal court held for the first time that the addition of judgeships was covered by Section 5. Given these varying decisions, it cannot be said that the law in this area is "reasonably clear."

The appellants suggest a time limit of January 1, 1992, to "give the district court an opportunity to consider the propriety of filling the seats through some method such as special elections." p. 35. Holding "special elections" in the interim makes some sense when the Section 5 case involves a change in the election system, such as the change from simultaneous elections to staggered elections in *Berry v. Doles*, 438 U.S. 190, 193 (1978), as there an election could be held under the "old" system. Here, however, the change attacked is the addition of another judge, who is elected in precisely the same manner as every other judge. There is thus no "old system" to

go back to for a special election because Louisiana seeks to elect the additional judge under the "old system."[44]

The election of unopposed candidates to judgeships and the October 6, 1990, elections should stand, and these judges should be allowed to continue to serve provisionally pending a judicial determination in the preclearance action in the district court in the District of Columbia.

CONCLUSION

For the foregoing reasons, the three-judge court correctly concluded that certain judgeships had been precleared. The Justice Department cannot use § 5 to attack an existing "system" for electing Louisiana's judiciary. The three-judge court did not err in refusing to enjoin the November 6 and December 8, 1990 elections. Judges who have been elected and are currently serving should not be thrown out of office.

All of the above and foregoing is thus respectfully submitted.

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April 4th, 1991

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[44] This further underlines the impropriety of the Justice Department using Section 5 to try to change Louisiana's long-standing "system" of electing judges. *See* pages 25-41 *supra*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF MISSISSIPPI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 87-3464 (LFO) (CRR) (DBS, U.S.C.A.)

UNITED STATES' RESPONSE TO STATE OF MISSISSIPPI'S FIRST SET OF INTERROGATORIES TO DEFENDANT

INTERROGATORY NO. 1

(a) Describe each of your policies, practices and/or procedures, formal and informal, internal or publicly published, in effect at any time regarding the preclearance of statutes which provides for election schemes containing majority vote, anti-single-shot voting, numbered post or numbered place, at-large voting requirements, and/or which transform a single-member election district into a multi-member election district, under Section 5 of the Voting Rights Act;

(b) Identify all documents and oral communications referring or relating to the subject matter of this interrogatory; and

(c) Identify all persons with knowledge of the subject matter of this interrogatory.

* * *

INTERROGATORY NO. 11

State whether you have ever precleared under Section 5 of the Voting Rights Act any statute(s) of a State or other covered jurisdiction other than Mississippi, *e.g.*, Alabama, which provided for the election of judges in at-large district-wide voting with separate numbered places for each position. If your response is in the affirmative,

(a) Identify the statute(s) by citation to its Chapter, Section and Law number;

(b) Explain the basis upon which you granted preclearance to the statute(s);

(c) Explain the differences between such statute(s) and the Mississippi statutes referred to in Appendix A which led to preclearance of such statute(s) and your objection to preclearance of the Mississippi statutes;

(d) Explain the differences between the benchmarks in the States or other covered jurisdictions as to which such preclearance was granted and the benchmarks in Mississippi in effect on November 1, 1964;

(e) Identify all documents and oral communications referring or relating to the subject matter of this interrogatory; and

(f) Identify all persons with knowledge of the subject matter of this interrogatory.

RESPONSE TO INTERROGATORY NO. 11

(a), (e) On several occasions the Attorney General has precleared Alabama statutes which established districts with more than one judge or added judges to existing districts, and provided that these judges would be elected at large, districtwide. On several occasions the

Attorney General has precleared Louisiana statutes which added judges to existing districts and provided that these judges would be elected at large, districtwide. Although these statutes denominate numbered posts for each such judge, a statute of general application antedating the Voting Rights Act required that each such judge be elected by a numbered post so that such designation of positions was not a change subject to the Section 5 preclearance requirement.

There may be other examples of statutes that have been precleared under Section 5 and which meet the criteria set out in this interrogatory. As explained in our response to Interrogatory No. 10, information regarding all of these submissions can be obtained from the Section 5 files maintained in the Voting Section, which are generally available for public inspection. Voting Section personnel will be available to assist representatives of the plaintiff in locating and inspecting such files.

(b)-(d), (f) See our response to Interrogatory No. 10(d)-(e), (g).

* * *

To the extent this interrogatory seeks information on expert witnesses, the United States responds that it has not yet identified anyone it expects to call as an expert witness at trial.

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ASSISTANT ATTORNEY GENERAL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF MISSISSIPPI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 87-3464

DECLARATION OF LORA L. TREDWAY

Pursuant to 28 U.S.C. 1746, I, LORA L. TREDWAY, make the following declaration:

1. I am an attorney for defendant United States of America in the instant case.

2. I am informed of the facts in this case and I have read the Plaintiff State of Mississippi's First Set of Interrogatories to Defendant.

3. I prepared and signed the foregoing answers and objections to Plaintiff State of Mississippi's First Set of Interrogatories to Defendant and they are true and correct to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 1988.

/s/ Lora L. Tredway
LORA L. TREDWAY